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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 99.

MARION A. BURT BECK,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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THE COURT PRESS, N. Y. C.

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Respondent's brief in opposition requires only a short reply.

Respondent is in error in stating (Br. 3) that all of the issues in the Tax Court were decided against the taxpayer. The Tax Court sustained the taxpayer's objection to taxing to her the income of the trust she created for her husband (R. 66a-69a).

On the two depletion issues, the most striking feature of the brief in opposition is its silent acquiescence in petitioner's contention (Pet. 23 and 27-29) that respondent conceded in its brief below that the lessee's State tax estimates omitted a substantial part of the merchantable ore within its knowl-

edge. This concession merely recognized the uncontradicted facts in the record, which proved that there was no factual basis for the Tax Court's assumption that these estimates (prepared by the Steel Corporation for tax-minimization purposes) included all the merchantable ore then known to exist on the Burt lease.

If in the face of this concession of error, the learned Court of Appeals had intended to affirm *on the opinion below* as to the admittedly erroneous facts, we respectfully submit that its action would have been such a departure from the accepted and usual course of judicial proceedings as to call for the granting of the writ under the general supervisory power of this Court. But we assume that the Court of Appeals had no such intention, and the only rational alternative seems to be that it accepted as a matter of law the Tax Court's novel doctrine that the estate tax figure was the equivalent of an arm's length transaction, conclusively fixing the fair value.

That this doctrine may now be the established rule in the Tax Court appears from its memorandum decision in *Mathieu,* entered July 14, 1952, C. C. H. Dec. 19.104(M). There the Court upheld the estate tax value of closely held stock as against the higher sales value eleven months later, and, from the language of the opinion, evidently treated section 29.113(a)(5)-1 (c) of Treasury Regulations 111 as conclusively equating the estate tax valuation with the fair market value.

As to the retroactive change in the depletion rate, in which the court below reached a result apparently in conflict with *Petit Anse Co.* v. *Commissioner* (C. A. 5)

155 F. 2d 797, cert. denied, 329 U. S. 732, and with *McCahill* v. *Helvering* (C. A. 8) 75 F. 2d 725, respondent admits (Br. 10) that the only basis for the change was the annual increase in the lessee's tax estimates (R. 48a). But in view of his concession below that these tax "estimates" were largely at variance with the lessee's *bona fide* estimate of the merchantable ore, it seems clear they were not *per se* a proper basis for an ascertainment by any one of any particular change in the ore reserves,—much less of a change "as a result of operations or of development work" (as the statute required), subsequent to 1919. The only evidence of development work after 1919 claimed by respondent (Br. 10, footnote) is the reference of taxpayer's expert to a 2½ million increase in the lessee's estimate, but the witness clearly stated that this increase was not in his opinion caused by any new drilling (R. 29a). Hence it may properly be said, paraphrasing the opinion in *Petit Anse,* that (1) there is no evidence to support a finding that the taxpayer had ascertained *as a result of subsequent development work* that the ore reserves exceeded the estate tax estimate, and (2) the Tax Court never undertook to make any such finding.

As to the third point—whether taxpayer should be taxed with that part of the royalties irrevocably assigned by the compromise agreement to a separate trust—respondent apparently concedes (Br. 14) that "one who inherits property subject to an income charge in favor of another is not taxable on such income," and that *Corbett Investment Co.* v. *Helvering* (C. A. D. C.) 75 F. 2d 525 so held, as did the five Tax Court cases cited in the petition herein at page 50.

Respondent seeks to distinguish and justify the holding below on the ground that here there was no such charge, but instead a direct personal obligation of taxpayer. But the briefest examination of the compromise agreement and the accompanying "bond" discloses that only a *charge* was here created, with the clearest possible express denial of any possible personal liability on the part of taxpayer and her co-heirs.

On the fourth point—whether a five to two court decision seven years after the date of a gift should retroactively determine its value, disregarding a Michigan statute passed still later (Pet. 15-16) which was evidently intended to nullify the court's decision retroactively—respondent (Br. 15) merely stands on the ancient theory that the Michigan court only declared and did not make the law. He ignores the nullifying statute altogether, as well as the predicament of the unhappy taxpayer who is supposed to make his tax return with clairvoyant knowledge of the mental operations of a majority of the Michigan Supreme Court seven years hence.

Respondent objects (Br. 15) to the claim of conflict on the alternative holding below, (R. 72a) because "the 'conflict' in that connection asserted by taxpayer (Pet. 54) is with a decision of the court below." But in the first place that decision—*Cohan* v. *Commissioner* (C. A. 2) 39 F. 2d 540—has been followed in four other circuits, with which the decision below would also necessarily conflict: *Roberts* v. *Commissioner* (C. A. 9) 176 F. 2d 221; *Sammons* v. *Commissioner* (C. A. 7) 177 F. 2d 837; *Marx* v. *Commissioner* (C. A. 1) 179 F. 2d 938, cert. denied 339 U. S. 964; and *Durkee* v. *Commissioner* (C. A. 6)

181 F. 2d 189. And secondly, in the words of Judge Learned Hand of the Second Circuit Court of Appeals in referring to this same *Cohan* case, in *Molnar* v. *Commissioner* (C. A. 2) 156 F. 2d 924, 927, "it is as much the function of the Supreme Court to decide differences within a circuit as between circuits."

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.

Aug. 6, 1952.